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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GUST FONDAHN,

Appellant,

vs.

SCHOONER "C. S. HOLMES," ETC.,

Appellee.

No. 2698.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

Petition for Rehearing

R. A. BALLINGER,

ALFRED BATTLE,

ROBT. A. HULBERT, and

BRUCE C. SHORTS,

Proctors for Appellee.

901-907 Alaska Building,
Seattle, Washington.

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Comes now the above named appellee and petitions the court for a rehearing herein upon the following grounds:

First:

That there is no evidence in the record to support the judgment in favor of the appellant for Five Hundred Dollars, the sum awarded by this court, or any other sum whatsoever.

It is elementary and needs no citation of authority, that one cannot recover for the neglect or wrong of another unless it is shown by a fair preponderance of the evidence that he has suffered some damage as the result of such neglect or wrong. So, even if it should be conceded that the captain did wrong in putting the libellant off at Port Angeles instead of taking him on to Port Townsend, yet there is absolutely no evidence that the libellant suffered any damage thereby. He was put under the care of Dr. Taylor, who was an experienced physician and surgeon and was equipped with a hospital and surgical facilities equal to any in the State of Washington. This evidence stands undisputed. The testimony is undisputed as to the care the libellant received at the hospital. Commencing on page 124, Dr. Taylor testifies as follows:

“Q. Now, what was done with him at the hospital?

A. He was taken to the surgery and given an anesthetic. There was a splint and dressings, if I remember right, and that was taken off and revealed a wound of the forearm, a circular wound, about one and a half or two inches in diameter, through which both bones were protruding, and it showed a very ragged wound, the muscles were torn and the periosteum torn back from the bones, a very ugly looking wound. The arm was washed with antiseptic soap and solutions, and the pieces

of cloth and one thing or other that had worked into the wound were picked out and the wound bathed with iodine; the bones put back in position and dressings applied, splints applied and put back to bed.

Q. Now, what was the nature of the splints applied?

A. The usual splints, both kinds, anterior—what we call an angular splint, it comes down this way, from the upper part of the arm and comes down here, and is tied up here and gives a pull, an extension to the arm.

Q. Do you know whether there was any particular name for that method?

A. It is just called anterior right-angular splints.

Q. In use by the profession?

A. In use by the profession for that kind of injury.

Q. You put the bones in proper position, did you?

A. Yes, the wound was open and they were put back in proper place, you could see them.

Q. And then, what, if anything, was done? Was there anything done with the muscles?

A. The muscles were torn and were all sewed up and the membranes.

Q. Did they make a covering over the bone?

A. Yes, sir."

There is not a word of testimony in the record anywhere that this was not proper treatment and

all that anybody could have done for the libellant. All the doctors testify that the libellant received the best treatment known to the profession. There is not a word of testimony in the record that the libellant would have received any different treatment had he been under the care of the physicians at Port Townsend. Then how and in what manner was the libellant damaged? It is true that the wound became infected, but all the doctors say, including the marine doctor at Port Townsend, that infection under the circumstances came almost as a matter of course on account of the nature of the wound and the condition of the libellant's body and clothing. There is not a word of testimony in the record, and we apprehend none could be produced, showing or tending to show that anything could have been done by any doctor on earth to have prevented the infection that followed in this case.

On page 5 of this court's opinion, the court said:

“The testimony indicates that if the appellant had been taken to Port Townsend the treatment of his arm would have been different from and more appropriate than that which was given him at Port Angeles, and that there was failure at the latter place to treat the injury with the care and skill which its very serious nature demanded.”

Dr. Taylor and his brother, both skilled and licensed physicians and surgeons, and the trained graduate nurse at the Taylor Hospital at Port Angeles, all testify just what was done and how the appellant was treated. There is absolutely no testimony that indicates that this treatment was not proper and the best known to the profession, and no effort was made by the libellant to offer any evidence to the contrary. The testimony of Dr. Carter, a witness on behalf of libellant, shows that he would have treated the patient in the same way, using the same character of splints.

It is hard for us to understand how it can be found that the Captain of the vessel did wrong in putting the libellant into the care of such competent doctors and well-equipped hospital at Port Angeles, but even if this was wrong, we submit that for this reason alone judgment should not be rendered for an arbitrary sum against the appellee. There should be some evidence that the appellant suffered some damage by reason of the alleged wrong. There being no such evidence, we submit that the judgment is wrong and a re-hearing should be granted.

Second:

We also ask for a rehearing upon the ground that the court has evidently misunderstood the facts.

On page two of the opinion the court says: "While in charge of Dr. Taylor the appellant's arm began to fester, and it later developed that the bones had not been in apposition and that they did not unite." The appellant's arm did "begin to fester," but there is no testimony in the record that the "bones had not been in apposition." The testimony of both doctors at Port Angeles and of the trained nurse state positively that the bones were set and put in perfect apposition. Dr. Taylor's testimony hereinbefore quoted shows that the wound was open and he saw the bones in perfect apposition, and that an X-ray was afterwards taken. It is true that the bones did not unite, but all of the doctors, including Dr. Carter, the Marine Doctor at Port Townsend, stated that the reason for this failure of union was due to the damage to the periosteum caused at the time of the accident and to the infection which followed later. No doctor had any control over this situation, and it would have been the same had the libellant been at Port Townsend at the Marine Hospital. So it cannot be successfully contended that the alleged wrong of the Captain in putting the libellant off at Port Angeles or his neglect in taking him on to Port Townsend had anything to do with the infection, or the failure of the bones to properly unite.

Under all the circumstances and the admitted facts in the record, the Captain was not at fault in stopping at Port Angeles, but he might have been negligent if he had carried the libellant on to Port Townsend. The libellant was in a critical condition and needed medical and surgical attention at the earliest possible moment. The wound was dirty and filled with bits of the sailor's woolen shirt. A few hours more of inattention might have resulted in gangrene. The Captain realized this. Upon investigation, the Captain found that there were competent surgeons in Port Angeles equipped with an up-to-date hospital and surgical facilities. Certainly in morals and in law, he was bound under the facts and circumstances of this case to stop at Port Angeles and put the libellant in a way to receive this care and attention. If he had carried him on to Port Townsend and gangrene had set in and the man had lost his arm or suffered severely from blood-poison, the Captain would have laid himself open to just criticism and censure for not having placed him in the hands of the doctors at Port Angeles.

We submit that in any event there is no testimony in the case to support the contention that the libellant suffered any damage by reason of any

neglect or wrong of the Captain of this vessel, and for that reason alone a rehearing herein should be granted.

Respectfully submitted,

R. A. BALLINGER,
ALFRED BATTLE,
ROBT. A. HULBERT, and
BRUCE C. SHORTS,

Proctors for Appellee.